(9)

No. 95-1521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS, ET AL.,

Petitioners,

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC., ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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14 pp

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

Respondents submit this supplemental brief in response to this Court's order of October 2, 1996.

The Department suggests in its Reply Brief (at 4) that the Court vacate the judgment below and remand this case for further consideration in light of § 633 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRA"). The Court should decline this suggestion and decide the case on the merits. As detailed below, § 633 does not apply retroactively to render moot respondents' statutory claim under 8 U.S.C. § 1152(a)(1) and does not deprive respondents of a remedy for pre-enactment violations of their right to IV processing in Hong Kong -- a right that was fully matured at the time of the enactment of the IIRA. Further, as the Department concedes, § 633 does not render moot respondents' constitutional claim under the Fifth Amendment or their arbitrary and capriciousness claims under the APA.[1]

1. The equities militate against accepting the Department's invitation to vacate and remand. If the Court were to accept this invitation, respondents would be placed in immediate danger of forcible repatriation. In an effort to justify a stay of the mandate in this case and a stay pending appeal in *Lisa Le*, the Department obtained from the HKG an undertaking not to forcibly repatriate plaintiffs here and in *Lisa Le* pending this Court's disposition of this case. In response to this Court's order of October 2, respondents requested that the Department seek from the HKG an extension of the undertaking to cover the proceedings on remand. The Department refused. A remand of the case would cause the HKG's undertakings to lapse and would likely subject respondents to immediate forcible repatriation.

Apart from exposing respondent beneficiaries to the danger of forcible repatriation, vacatur would significantly delay the resolution of a case which, owing in no small measure to the

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1. Whether or not the Court agrees that respondents' § 1152(a)(1) claim is moot, it should proceed to consider these claims. Although the court of appeals did not find it necessary to rule on these claims, where, as here, alternate grounds for relief have been fully briefed and argued before the courts below and the record is sufficient to review them, this Court may consider those grounds. *See Thigpen v. Roberts*, 468 U.S. 27, 30, 32 (1984).

Department's procedural maneuvering (Opp. Cert. at 14-16), has been tied up in the appellate courts for more than two and one half years. This would be unfair to respondents, who filed this action for the purpose of vindicating their right and the right of similarly situated persons to *timely* non-discriminatory processing of their visa applications in Hong Kong in order to end their detention and prolonged separation from their loved ones. *Id.* at 14.

2. Respondents' statutory claims are not moot because § 633 does not retroactively "legalize" a Department policy that violated the INA before it was amended. The Department's discriminatory policy violated § 1152(a)(1) prior to the effective date of the IIRA, September 30, 1996. Section 633 does not render lawful conduct that was unlawful under the old law.

This Court will not construe a new law in a manner that "attaches new legal consequences to events completed before its enactment" absent "an express statutory command" or, at the least, an expression of "clear congressional intent favoring such a result." *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1499, 1505 (1994); *see Greene v. United States*, 376 U.S. 149, 160 (1964).[2]

The presumption against retroactivity is no less applicable in situations where Congress seeks to correct what it believes to be a court's improper statutory construction. As the Court stated in *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1516 (1994), "[e]ven on th[e] assumption" that such factors are present in the case of a given statute, a "clear expression of congressional intent to reach cases that arose before its enactment" is nonetheless required before a statute will be construed to have retroactive effect.

Here, there is no express statutory command making § 633 retroactive. Nor is there any clear expression of legislative intent. To the contrary, the fact that § 633 is silent on the subject of retroactivity, while at least twelve other provisions of the IIRA

2. The fact that § 633 amends a statutory provision that arises in the exclusion context does not alter the presumption against retroactivity. *See Chew Heong v. United States*, 112 U.S. 536 (1884) (applying presumption against retroactivity to statute barring Chinese laborers from reentering the United States who exited without a reentry certificate).

(including the section immediately preceding § 633)[3] are expressly retroactive, is compelling, if not conclusive, evidence that Congress did not intend § 633 to be retroactive.[4]

3. Respondents remain entitled to a remedy for the Department's past illegal conduct. From the time they filed this lawsuit in February 1994, respondents sought two separate remedies: a preventive injunction, i.e., an injunction to compel future compliance with the law, and a reparative injunction, i.e., an injunction to compel the Department to process the IV applications of respondent visa beneficiaries in a manner necessary to remedy, so far as possible, the effects of the Department's past illegal conduct *See* 1 Dan B. Dobbs, *Law of Remedies*, 225, 227 (2d ed. 1993) (distinguishing "reparative" injunctions, which "restore the plaintiff to a preexisting entitlement," and "preventive" injunctions, which enjoin future conduct).[5]

We acknowledge that § 633 may prevent respondents from obtaining the preventive injunction originally sought in their § 1152(a)(1) statutory claim (*but see* pp. 7-8, *infra*), that is, an injunction permanently requiring the Department in the future to process Vietnamese IV applicants in Hong Kong in compliance with § 1152(a)(1) on a non-discriminatory basis.

3. *See* IIRA §§ 212(e), 306(c), 309(c)(5), 321(b), 322(c), 324(c), 342(b), 347(c), 351(c), 412(e)(4), 632(b)(1).

4. The Department's argument that § 633 does apply retroactively is based entirely on two floor speeches of Congressmen who were strongly opposed to § 633. (Reply Br. at 3.) This is hardly the type of clear statement of congressional intent that this Court requires to overcome the strong presumption against retroactive application of a new law. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988) ("'[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'").

5. As the district court in this case correctly noted, from the outset respondents sought an "injunction directing defendants 'to take all necessary and proper action to facilitate and expedite processing and to otherwise eliminate the effects of [the Department's] illegal policy.'" Pet. at 25a-26a (quoting plaintiffs' motion for summary judgment); *see also* JA 28.

Respondents, however, remain entitled to reparative relief to remedy the Department's past illegal policy. Section 633 does not on its face eliminate any remedies to which respondents may be entitled for past violations of § 1152(a)(1). For a period of at least eleven months between April 1993 and March 1994, and twenty-two months between December 1994 and September 1996, the Department refused to process Vietnamese IV applicants in Hong Kong, in violation of § 1152(a)(1) as then in effect. During that period, respondents' IV applications were or became "current," i.e., respondents were entitled to immediate processing of their applications and, if found eligible, issuance of a visa -- a process that typically takes a few weeks. As of September 30, 1996, therefore, respondents had a fully matured claim that the Department had discriminated against them in violation of § 1152(a)(1). Had the Department not acted unlawfully, all of the respondents would have been processed before September 30, 1996.

For this reason, respondents' statutory claim is not moot. A case is not rendered moot unless "events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here, the effects of the Department's illegal policy still persist. Respondents now seek a remedy that looks back to the period of illegal conduct and attempts to put the respondents, as far as possible, into the position they would now be in but for the illegal conduct.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). In view of the federal court's broad remedial power and the familiar presumption that for every right there is a remedy, reparative relief that orders the Department to restore what it unlawfully withheld unquestionably is available. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, Section 706 of the APA provides courts with broad equitable powers to remedy the impermissible actions of federal agencies, including the power to compel agency action "unlawfully withheld or unreasonably

delayed." 5 U.S.C. § 706. *See also* 5 U.S.C. § 702 (authorizing all forms of relief other than money damages); *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Courts routinely require the government to undertake action not specifically required by law when necessary to remedy the effects of past unlawful conduct.[6]

Nothing in § 633 precludes such relief. Section 633 does not prohibit the Department from processing respondents' IV applications in Hong Kong. It simply says that the Department is no longer required to do so. In light of the presumption in favor of the existence of a remedy, § 633 cannot be construed to bar remedies absent a clear expression of congressional intent to do so. No such clear expression of congressional intent can be found in the language or legislative history of § 633.

Citing *Landgraf*, however, the Department asserts that all injunctive relief is "prospective," and thus, that the enactment of § 633, by rendering the Department's policy lawful at the present time, leaves respondents with no remedy for the Department's unlawful discrimination in the past. Reply Br. at 2.

The Department's position stretches the Court's passing comment in *Landgraf* far beyond its intended meaning. The Court there explained that "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Id.* at 1501. The cases that the Court cited for this proposition (as well as those cited by the Department, Reply Br. at 2-3), however, either addressed statutory enactments that expressly eliminated the requested remedy,

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6. *See, e.g., Louisiana v. United States*, 380 U.S. 145, 154 (1965) (courts have "the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past"); *Greene v. United States*, 376 U.S. 149, 152-53, 160-64 (1964) (petitioner entitled to remedy for lost earnings based on the 1955 regulation in effect at the time of the government's illegal action withholding his security clearance, notwithstanding promulgation while the matter was pending of new regulations placing additional burdens on him); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978); *Konn v. Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972) ("mandamus is available to remedy the consequences" of the government's failure to follow its own regulations) (citing numerous cases); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1262-63 (5th Cir. 1980).

eliminated the need for any remedy, or involved circumstances where the plaintiffs were not seeking reparative relief.[7] These cases simply do not involve the type of injunctive relief sought by respondents, i.e., relief to eliminate the effects of past unlawful conduct by requiring the Department to process the applications of "current" Vietnamese nationals whose processing was illegally withheld prior to the enactment of § 633.

The operative question in determining whether a remedy is retrospective or prospective is not whether the remedy to be granted will take place in the future -- after all, all remedial decrees, be they judgments for money damages or mandatory injunctions, are to take place in the future -- but whether the purpose of the remedy is to correct for the effects of wrongful conduct in the past or to require future compliance with the law. *See Landgraf*, 114 S. Ct. at 1526 (Scalia, J., concurring) (recognizing that purpose of prospective relief is to affect the future rather than remedy the past). As demonstrated *supra*, that a reparative injunction is available to remedy the effects of past discrimination is well-established.

4. In our merits brief (at 9-10, 25-36), we argued that the State Department violated the equal protection rights of U.S. citizen respondents Em Van Vo, Mandy Yung and Nguyen Van Dien when it discriminated against them on the basis of national

7. *See American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921) (applying Clayton Act, which had passed during pendency of case and which forbade injunctions to restrain employees from picketing, to remove injunction entered prior to its enactment); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921) (injunction still available for violation of antitrust law, despite amendment eliminating availability of injunctive relief to remedy other violations); *Hall v. Beals*, 396 U.S. 45 (1969) (eliminating need for remedy as case had become moot under new legislation that reduced the residency requirements for voters from six to two months); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856) (after court had ordered removal of bridge found to be nuisance, intervening legislation declared bridge to be lawful road passage; court found because placement of bridge no longer violated the law, it would accomplish nothing to require removal, as bridge could be rebuilt); *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (intervening legislation explicitly gave defendant right to build a telescope project, thereby superseding the previous restrictions).

origin in the administration of a neutral family reunification program. The Department argues that this claim is no longer valid because Congress in enacting § 633 has expressly delegated to the Secretary affirmative authority to discriminate in visa processing on the basis of race, gender and national origin. The Department is wrong.

As explained in our merits brief (at 29-30), to the extent constitutional authority exists in the immigration context to discriminate against American citizens on the basis of suspect classifications, only Congress (and perhaps the President) may wield such authority. As we further explained (at 31-36), this Court requires clear evidence of congressional intent before it will impute a delegation of authority committing to an administrative agency unfettered discretion to interfere with the enjoyment of a protected liberty interest.[8]

Section 633 is by no means a clear delegation of such authority. By its terms, § 633 authorizes nothing. Rather, the new provision merely states that "*[n]othing in this paragraph* [referring to § 1152(a)(1)] shall be construed to limit the authority of the Secretary of State" in respect of immigrant visa processing. Accordingly, to the extent the Secretary otherwise has the authority to discriminate on the basis of race, gender and national origin, § 1152(a)(1) can no longer be construed as limiting that authority with respect to visa processing. To the extent that the Secretary lacks such authority, however, § 633 does not affirmatively grant him such sweeping and dangerous power. In fact, the Department agrees that the amendment "was intended not to change the law." Reply Br. at 3.

Under the Department's interpretation, § 633 is an affirmative grant of authority to discriminate against any "person" (and not just aliens outside the United States) in visa processing not only

8. *See Greene v. McElroy*, 360 U.S. 474 (1959). In *McElroy*, this Court held that even in the context of national security -- an area involving the most sensitive of interests -- the traditional safeguards of due process may "not be restricted by implication or without the most explicit action by the Nation's lawmakers, *even in areas where it is possible that the Constitution presents no inhibition.*" *Id.* at 507 (emphasis added).

on the basis of nationality and national origin, but also on the basis of race and gender. If this interpretation were correct, § 633 would run afoul of the constitution, even though it relates to immigration. Under the test enunciated in *Fiallo v. Bell*, 430 U.S. 787, 794 (1977), and *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), congressional policy choices concerning the admission of aliens must be supported by at least "a facially legitimate and bona fide reason." A congressional policy choice that would allow the Secretary to discriminate against American citizens in the administration of benefits under a congressional program on the basis of, for example, the race of their family members cannot meet even that level of scrutiny.[9]

5. If the Court is inclined to relinquish this case, it should dismiss the writ of certiorari as improvidently granted, rather than vacating and remanding as the Department suggests, because the reasons given by the Department for why the writ should be granted no longer apply. In its petition (at 25), the Department argued that this Court should grant certiorari because it believed the decision below would deprive the Department of the ability "to respond to uncontrolled migration" and would "cast doubt" on its ability to "require special procedures for visa applications by nationals of certain countries." Whatever merit these arguments once had -- and we believe they had none -- the enactment of § 633 ensures that henceforth § 1152(a)(1) cannot "be construed to limit" the Secretary's authority in these areas. Accordingly, the principal concern that led the Department to seek certiorari has disappeared.

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9. In its supplemental brief, the Department cites *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), for the proposition that the Executive Branch can draw distinctions among aliens on the basis of nationality, "so long as the classifications are not wholly irrational." *Narenji*, however, is inapposite for two reasons. First, unlike *Narenji*, which involved aliens who were invited to this country on student visas, this case involves the constitutional rights of American citizens. Second, the Attorney General in *Narenji* was acting specifically "at the direction of the President." *Id.* at 617. In contrast, in this case, neither the President not the Congress has delegated to the Secretary, who has no inherent constitutional power of his own over immigration, the authority to discriminate against American citizens.

The other basis on which the Department urged certiorari -- that IV processing would "derail" the CPA -- is even more incredible today than it was when the Department first advanced it. The CPA has expired, leaving the issue of visa processing nothing more than a bilateral issue between the United States and Hong Kong/Great Britain. The record, however, is devoid of any evidence that Hong Kong or Great Britain have any concerns relating to U.S. immigrant visa processing in Hong Kong. To the contrary, both Great Britain and Hong Kong (as well as Australia and New Zealand) process in Hong Kong the IV applications of Vietnamese boat people. Opp. Cert. at 24-25; Supplemental Declaration of Mark L. Zuckerman, executed on Oct. 11, 1996 ("Zuckerman Decl.") at ¶ 7 (lodged with the Clerk). Indeed, Hong Kong has processed over 400 such applications since January 1994. Opp. Cert. at 24. Further, if Hong Kong were concerned about IV processing by the U.S. Consulate, it had and has the power to stop it because the boat people cannot be released from detention to attend consular interviews without the HKG's cooperation.

Nor is there (or was there ever) any danger that IV processing will discourage voluntary repatriation.[10] As a result of § 633, the only persons entitled to IV processing under the decision below are those whose visas became current before September 30, 1996, the effective date of IIRA. There are 35 such individuals out of a total remaining camp population of 11,500. Zuckerman Decl. at ¶ 2. It defies common sense to suggest that the 99.7% of the camp population who are not in this closed group are influenced in their decision to remain in detention by IV processing for the handful of people who are. Opp. Cert. at 25-27.

As the Department is aware, the HKG is determined to clear the camps before the Colony reverts to the control of Communist China on July 1, 1997, and is forcing boat people to return to Vietnam at a rate of 600 to 750 per month. The rate of additional "voluntary" repatriation is now 600 to 700 per month and consists

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10. The Department has never produced anything but self-serving litigation affidavits to support its claim that IV processing reduces voluntary repatriation. The statistical evidence flatly contradicts this claim. Opp. Cert. at 25-26.

largely of those who have been notified that if they do not repatriate by a fixed time, they will be subject to imminent forced repatriation. Zuckerman Decl. at ¶¶ 3-4. It is absurd to suggest that their decision to "voluntarily" repatriate to Vietnam will be influenced one way or another by the decision below. In fact, the United Nations High Commissioner for Refugees recently notified the Department that it does not object to IV processing in Hong Kong of the 35 IV beneficiaries whose visa petitions had become current prior to September 30, 1996 and does not believe that such processing will have any adverse effect on voluntary repatriation. *Id.* at ¶ 6.

Vacatur is inappropriate in this case. As discussed *supra*, § 633 does not retroactively make lawful the Department's policy before September 30, 1996, which the D.C. Circuit held was unlawful under § 1152(a)(1) as it then provided. While the enactment of § 633 may raise a question about the nature of the relief now available to respondents to remedy that past violation of law, the statute says nothing about whether the decision below was incorrect. If, in light of IIRA, the decision below no longer raises issues of important federal law that should be settled by this Court, *see* Sup. Ct. R. 10, the appropriate course is to dismiss the writ and allow the decision below to stand, as it would have had certiorari not been granted. *See Triangle Improv. Council v. Ritchie*, 402 U.S. 497, 498-99 (1971) (Harlan, J., concurring); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75-76 (1955).[11]

CONCLUSION

The Court should consider the case on the merits and affirm. In the alternative, the Court should dismiss the writ of certiorari as improvidently granted.

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11. Dismissal of the writ also would be fairer to respondents than vacatur, because it is likely to result in a quicker disposition by the court below, which would not be burdened by the Department's inevitable effort to relitigate the issues that were decided against it the last time around.

Respectfully submitted,

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